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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.V., JR., et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. J.V., Defendant and Appellant.	G042267 (Super. Ct. Nos. DP015656, DP015657) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Jane L. Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

* * *

J.V. (father) appeals from the juvenile court's order terminating his parental rights. He argues there was insufficient evidence his children were likely to be adopted within a reasonable time. For the reasons expressed below, we reverse.

I

FACTUAL AND PROCEDURAL BACKGROUND

In an earlier opinion (*In re J.V.* (Nov. 20, 2008, G040296 [unpub. opn.]) we affirmed the juvenile court's orders terminating reunification efforts and placing J.V. (born June 1993) and his sister M.V. (born July 1994 or maybe 1995) in long-term foster care. As recounted in our previous opinion, the juvenile court declared the children dependents because the children's father, J.V., sexually molested M.V.'s teenage friend, and raped and impregnated M.V., who later gave birth to a baby suffering from congenital defects. The children's mother's whereabouts have always been unknown.

In August 2008, the godparents, with whom the children had been living since September 2007, stated a desire to adopt, and the court scheduled a Welfare and Institutions Code section 366.26 hearing (.26 hearing) for December 2008.

In November 2008, the godmother asked Orange County Social Services Agency (SSA) to remove M.V. from her home and discontinue her adoption. M.V. was exhibiting defiant behavior at home and school. On November 19, M.V. took an overdose of prescription medication in an attempt to kill herself and was hospitalized in a psychiatric facility until early December. She continued to express suicidal thoughts after her release and was hospitalized a second time.

SSA changed its recommendation concerning M.V. from likely to be adopted to difficult to place and the court agreed to continue the .26 hearing for 180 days. J.V. remained on track to be adopted by the godparents.

By January 2009, M.V. was living at Orangewood Children's Home and denying depression or suicidal thoughts. In early February 2009, the godparents changed their minds and wished to move forward with M.V.'s adoption. The social worker reported M.V. was concerned with the godfather's drinking and felt the godparents abandoned her when she struggled to deal with her depression. At a team decision meeting, the godmother stated M.V. had lied about having a boyfriend when confronted with accusations she had threatened to kill him. The godmother believed M.V. might deteriorate if not placed with her brother, and agreed to participate in therapy to resolve conflicts with M.V. The parties agreed to overnight visits for M.V. at the godparents' home, and to enroll M.V. in her former, familiar school to reduce her emotional distress.

Three weeks later, M.V. returned to live with the godparents. The social worker changed her recommendation to termination of parental rights and adoption. M.V. and the godmother participated in weekly conjoint therapy. The therapist reported therapy sessions went well and M.V. and the godmother enjoyed their time together.

In April 2009, the godmother reported no behavioral concerns with M.V. M.V. reported she liked her school and endeavored to stay out of trouble. But the therapist reported M.V. was experiencing frustration at school and the godmother had difficulty listening empathetically to M.V. without offering advice or becoming judgmental.

The godparents' five-bedroom home included their four children (two adults), an adult son's wife and child, and M.V. and J.V. The godmother was 45 years old and employed as a housekeeper; the godfather was age 50 and a laborer. The adult son had been arrested in August 2008 for disturbing the peace and resisting arrest after a

party. The godmother stated she would elect not to adopt the children if her adult son could not remain in the home.

As of April 2009, six months after initiation of a home study, several items of documentation remained outstanding, including Department of Motor Vehicles law enforcement clearances for two of the adults in the home (both of whom had previously submitted clearances in conjunction with the foster placement in 2007), other questionnaires and records, including medical records, and employment verification for the godmother. The social worker attempted to assist the godparents in completing the paperwork but the godmother complained she did not have time to complete the documents.

At the .26 hearing in June 2009, the social worker testified the godparents were committed to adopting but SSA could not complete the home study until August 2009. Because the necessary paperwork had not been completed, SSA could not yet recommend the adoption. The social worker testified she could not conclude J.V. or M.V. were generally adoptable without preparation of another permanent planning assessment, but she expected J.V. would be deemed adoptable.

The juvenile court concluded the godparents "were likely to be determined eligible to adopt upon eventual completion of the home study," and father's concerns "were speculative at best." The judge noted M.V. had improved through counseling, that J.V. was a "fine young man" with "outstanding goals and a full life ahead," and determined by clear and convincing evidence "the children . . . will be adopted."

II

DISCUSSION

Insufficient Evidence Children Likely to be Adopted within a Reasonable Time

Welfare and Institutions Code section 366.26 provides that: "(c)(1) If the court determines, based on the assessment provided as ordered under subdivision (i) of Section 366.21, subdivision (b) of Section 366.22, or subdivision (b) of Section 366.25, and any other relevant evidence, by a clear and convincing standard, *that it is likely the child will be adopted*, the court shall terminate parental rights and order the child placed for adoption." (Italics added.)

The standard of review on appeal from an order establishing a permanent plan of adoption is whether there is substantial evidence in the record from which a reasonable trier of fact could find, by clear and convincing evidence, that it was likely the minor would be adopted within a reasonable time. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623-624; *In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065 [clear and convincing evidence standard requires "a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind"].) In conducting our review, we draw every reasonable inference and resolve all conflicts in the evidence in favor of the trial court's adoptability finding. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) Our focus is on the child, and whether the child's age, physical condition, and emotional state make it difficult to find a person willing to adopt. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650 (*Sarah M.*).)

Father contends the juvenile court erred when it found the children adoptable because they are not generally adoptable due to their ages, and they are not

specifically adoptable because the godparents failed to complete the home study and stated they would not adopt the children under certain circumstances.

SSA acknowledges the home study had not been completed at the time of the .26 hearing, but contends the godparents were fully committed to adoption, had made progress in the home study evaluation, and had no readily-apparent impediments to a successful adoption. It also argues there was sufficient evidence J.V. was generally adoptable.

SSA apparently concedes M.V. was not generally adoptable. Given the social worker's testimony she could not state either of the children was generally adoptable without preparation of a new permanent planning assessment, the advanced ages of both children, M.V.'s history of sexual trauma and severe emotional problems, and the absence of evidence demonstrating the advisability of permanently separating the siblings,[1] we conclude there is insufficient evidence the children were generally adoptable.

A juvenile court need not find a dependent child generally adoptable before terminating parental rights. All that is required is clear and convincing evidence of the likelihood that the dependent child will be adopted within a reasonable time. (*In re Zeth S.* (2003) 31 Cal.4th 396, 406 (*Zeth S.*).) When the child is adoptable based on a particular family's willingness to adopt the child, the trial court must determine whether there is a legal impediment to adoption. (*In re Carl R.* (2005) 128 Cal.App.4th 1051,

[1] J.V. was generally healthy, doing well in school and exhibited no emotional problems. But his age was a concern as the social worker acknowledged children generally become less adoptable as they grow older. The record reveals the siblings had lived together all their lives and were emotionally close, neither wished to relocate from their current placement, and the godmother believed M.V. might deteriorate if not placed with her brother.

1061; *Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649 [juvenile court must consider a prospective adoptive parent's willingness to adopt to determine whether child is likely to be adopted within a reasonable time].)

The social worker believed the godparents were committed to adopting, expected the home study to be completed by August 2009, and saw no present impediment to adoption. But the lack of employment verification prevented completion of the study and she conceded the godparents' failure to provide required information could preclude them from adopting.

The evidence submitted at the .26 hearing was insufficient to demonstrate the godparents' ability to adopt. SSA initiated the home study in September 2008. Almost nine months later, the godparents had not submitted required paperwork to evaluate their home as an adoptive placement. The record disclosed potential problems involving the godmother's employment and criminal matters involving other adults in the home. We cannot conclude on the record before us the godparents would successfully complete the home evaluation process for adoption, even if we assume the godparents remained steadfast in their commitment.

Finally, we agree with SSA the evidence amply supports a finding the children's best interests do not lie in maintaining a relationship with their father. But the law is designed to prevent legal orphanage. If parental rights are terminated with no prospect of adoption, the children (and the government) are deprived of potential financial support, including inheritances, obtained from relatives. We also note if the godparents' home study was approved in August 2009 or other evidence exists to support

a finding of adoptability as to one or both children, nothing precludes the court from scheduling another .26 hearing.[2]

III

DISPOSITION

The judgment terminating parental rights is reversed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

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[2] County counsel moved to augment the appellate record with three postjudgment reports submitted by SSA to the juvenile court. The first informed the court that M.V. was hospitalized for another suicide attempt and self-mutilation on August 12, 2009. The second report reflected M.V.'s placement with the godparents was terminated August 18, 2009, at their request. The third report stated M.V. was discharged on August 25, 2008, and placed in a group home, and that J.V. was "okay" with not having his sister in the same home. The godparents were not willing to be involved in arranging sibling visits but agreed to allow them to occur.

We denied the motion to augment because postjudgment evidence should only be considered when the parties stipulate to reverse the judgment (see *Zeth S., supra*, 31 Cal.4th at p. 413, fn. 11), and SSA declines to stipulate "in its desire to ensure [M.V.]'s best interest."